IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Crim. No. 01-455-A
	)	
ZACARIAS MOUSSAOUI	)	

DEFENDANT'S MOTION TO SUPPRESS STATEMENTS AND POINTS AND AUTHORITIES IN SUPPORT THEREOF

Defendant, Zacarias Moussaoui, through counsel, pursuant to the Fifth Amendment to the United States Constitution and *Miranda v. Arizona,* 384 U.S. 436 (1966), respectfully moves this Court to suppress all statements he allegedly made to federal law enforcement officers following his arrest.[1]

Facts

On August 16, 2002, at approximately 5:00 p.m., INS Special Agents Weess and Nordman arrested Zacarias Moussaoui, a French citizen, without incident in his motel room in Eagen, Minnesota. The basis for the arrest was that Mr. Moussaoui had overstayed his allotted time in the United States pursuant to the visa waiver program. Subsequent to the arrest and while still on the scene, the agents searched a Subaru sedan belonging to Hussein Al-Attas, who was sharing the motel room with Mr. Moussaoui. The agents found a folding knife under the driver's seat of that vehicle, which Mr. Moussaoui allegedly admitted was his.

Thereafter, INS Special Agent Nordman transported Mr. Moussaoui to the INS Detention Facility in Bloomington, Minnesota. While en route to that facility, Mr. Moussaoui allegedly

[1] Counsel do not, at this time, move to suppress the physical evidence seized pursuant to the post September 11, 2001 search warrants. However, they reserve the right to do so once discovery is completed and Mr. Moussaoui's motion to proceed pro se is resolved.

stated several times that he needed to complete his studies as a flight student and that he would voluntarily return to INS custody if he was released temporarily in order to finish his course work.

Upon arrival at the detention facility, Mr. Moussaoui was processed and, at 9:24 p.m., he was interviewed by INS Special Agent Weess and at least one other agent. Immediately before the interview, at 9:23 p.m., Mr. Moussaoui was provided with an INS advice of rights and waiver form, informing him of his rights under *Miranda v. Arizona*. Mr. Moussaoui allegedly signed that form indicating that he had been advised of and was waiving his rights. Upon information and belief, Mr. Moussaoui, either at that time or during the interviews which followed, also was informed that because he was being held on immigration charges, he was not entitled to a court-appointed lawyer to assist him. Thereafter, on the evening of August 16 and the afternoon of August 17, 2001, Mr. Moussaoui made oral statements in response to questioning by one or more federal agents, including Special Agents Weess and Samit.

Upon information and belief, the advice of rights that Mr. Moussaoui received at 9:23 p.m. on August 16, 2001, was the first and only time that Mr. Moussaoui was advised of his *Miranda* rights.

Argument

I. The Law

The purpose of the *Miranda* warnings is to counteract the "inherently compelling pressures [in a custodial interrogation that] work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). Supplementing these "inherent" pressures were more overt influences,

such as physical brutality, trickery, and incommunicado interrogation, that the Supreme Court wanted to eliminate. *See id*. at 446 (brutality), 455 (trickery), 445-47 (incommunicado interrogation). All of these pressures and influences undermine the "voluntariness" that the Fifth Amendment requires of statements in a criminal case.[2]

Thus, the *Miranda* rights are "constitutionally based" safeguards to protect the Fifth Amendment. *Dickerson v. United States*, 530 U.S. 428 (2000) (holding that *Miranda* is "constitutionally based"). The rights must be read to the suspect before questioning begins, and be "afforded to him throughout the interrogation." *Miranda*, 384 U.S. at 479. Further, the Government has the burden of establishing compliance with *Miranda*. *Id*. at 444, 475, 479; *Colorado v. Connelly*, 479 U.S. 157, 168-69 (1986) (prosecution bears burden of proving a valid waiver of *Miranda* rights by a preponderance of the evidence).

The *Miranda* warnings are required only when the suspect is subject to "police interrogation while in custody." *Miranda*, 384 U.S. at 477.[3] "Interrogation" means "express questioning or its functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). Thus, interrogation includes "words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id*. at 301. "Custody" means "'formal arrest

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[2] *See Miranda*, 384 U.S. at 460 ("[T]he privilege [against compelled self-incrimination under the Fifth Amendment] is fulfilled only when the person is guaranteed the right to 'remain silent unless he chooses to speak in the unfettered exercise of his own will.'") (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)).

[3] This is true even when a suspect is arrested on immigration charges because those charges may lead to criminal proceedings. Thus, even though un-*Mirandized* statements are admissible in a civil deportation proceeding, they cannot be used against a defendant in a criminal case arising out of an immigration arrest. *See Chavez-Raya v. Immigration and Naturalization Service*, 519 F.2d 397, 402 (7th Cir. 1975) (concluding that "the lack of *Miranda* warnings would render an alien's statement, made during a custodial interrogation, inadmissible in a criminal prosecution for violation of the immigration laws").

or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). Key to custody is whether the suspect is under formal arrest or "otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 477.[4]

Moreover, a suspect may waive his *Miranda* rights, but only after they have been read to him. *Id*. at 470, 479. The waiver must be knowing, intelligent, and voluntary. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979); *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). "Knowing" means "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). "Intelligent" generally means that the suspect understood the rights that have been read to him. *See Tague v. Louisiana*, 444 U.S. 469 (1980) (per curiam) (no intelligent waiver where the officer never asked the suspect if he understood the rights that had been read to him).[5] Lastly, a waiver is "voluntary" if it is "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. at 421; *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26, 248 (1973) (test is whether the suspect's "will has been overborne and his capacity for self-determination critically impaired").

Finally, statements obtained in contravention of *Miranda* are inadmissible in the

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[4] *See also Oregon v. Mathiason*, 429 U.S. 492 (1977) (suspect who voluntarily acceded to police questioning at the police station and who was told that he was not under arrest, was not in custody since he was not under arrest or otherwise formally detained); David Nissman & Ed Hagen, *Law of Confessions* at 4-12 (2d ed. 1994) (key for custody is "whether the suspect has been arrested, or the circumstances are so police dominated that it is the functional equivalent of an arrest").

[5] *See also* Nissman & Hagen, *supra* note 4 at 6-15, 6-16 ("Intelligent waiver is customarily shown by having the officer testify that the defendant received warnings, was asked if he or she understood them, and gave an affirmative response.").

Government's case in chief. *Miranda*, 384 U.S. at 444. Thus, for example, the prosecution cannot make its case with statements that are the result of an incorrect recitation of rights, a failure to abide by the rights, or a failure to read the rights. The prosecution can, however, use such statements in rebuttal to impeach the suspect's credibility if the suspect's in-court testimony differs from those statements. *Harris v. New York*, 401 U.S. 222 (1971); *Oregon v. Hass*, 420 U.S. 714 (1975).

II. The Government Violated Mr. Moussaoui's Rights Under the Fifth Amendment and *Miranda v. Arizona*

A. Mr. Moussaoui's Statement on the Scene of and Following His Arrest

After Mr. Moussaoui's arrest at his motel room, but before he had been advised of his *Miranda* rights, he made an oral statement that, upon information and belief, was in response to questioning by the INS agents. Specifically, he admitted ownership of a folding knife found under the driver's seat of Mr. Al-Attas' Subaru automobile. Assuming this statement was the result of some question by the agents, or the functional equivalent thereto, it should be suppressed as Mr. Moussaoui was formally under arrest (and thus in custody) at the time, and the statement was made before the federal agents had advised him of the *Miranda* warnings.

B. Mr. Moussaoui's Statements En Route to the Detention Facility

During Mr. Moussaoui's transport to the INS Detention Facility in Bloomington, Minnesota, but before he had been advised of his *Miranda* rights, he stated several times to INS Special Agent Nordman that he needed to complete his studies as a flight student and that he would voluntarily return to INS custody if he was released temporarily in order to finish his course work. Again, assuming these statements were the result of some inquiry by the agents, or

the functional equivalent thereto, they should be suppressed as Mr. Moussaoui was formally under arrest (and thus in custody) at the time, and the statements were made before the agents had advised him of the *Miranda* warnings.

C. Mr. Moussaoui's Statements at the Detention Facility on August 16 and 17, 2001

Mr. Moussaoui made numerous oral statements to federal agents on the evening of August 16 and the afternoon of August 17, 2001 at the INS Detention Facility in Bloomington, Minnesota. It appears from the INS advice of rights and waiver form that Mr. Moussaoui was advised of and waived his *Miranda* rights on August 16 at 9:23 p.m., before he made his statements. His formal arrest, however, occurred well over four hours earlier, at approximately 5:00 p.m., leaving ample time for questioning prior to the *Miranda* waiver. It is thus not clear whether all of Mr. Moussaoui's statements were preceded by an advisement and waiver of *Miranda*. If any of his statements were obtained before the advisement and waiver of the *Miranda* rights, they must be suppressed as they were the product of interrogation and he clearly was in custody at the time. The Government has the burden of proof on this point. *Miranda,* 384 U.S. at 444, 475, 479.

Further, at some point prior to or during the interviews, Mr. Moussaoui was informed that because he was being held on an immigration charge, he did not have the right to appointed counsel. That statement had the effect of undermining the *Miranda* warnings and any purported waiver, as it directly contradicted *Miranda's* guarantee, contained in the INS advice of rights form, that a lawyer would be provided to Mr. Moussaoui, if one was requested, prior to any questioning. Thus, the statement took away with one hand what it purported to give with the other, rendering the *Miranda* rights ineffectual. Moreover, as to any *criminal* immigration

charges, the statement was false.

The Ninth Circuit Court of Appeals faced a similar situation in *United States v. Connell*, 869 F.2d 1349 (9th Cir. 1989). There, the warnings "were equivocal and open to misinterpretation" because while they informed the suspect that he had the right to a lawyer during the interrogation, they also implied that the Government would not pay for the lawyer if he could not do so himself. *Id*. at 1350-51, 1353. Rejecting as "fatally flawed . . . a version of the *Miranda* litany if the combination or wording of its warnings is in some way affirmatively misleading," the court suppressed the defendant's post-*Miranda* confession. *Id*. at 1352. "[W]hat *Miranda* requires," the Ninth Circuit wrote, "'is meaningful advice to the unlettered and unlearned in language which [they] can comprehend and on which [they] can knowingly act.'" *Id*. at 1351 (alterations in original) (quoting *Coyote v. United States*, 380 F.2d 305, 308 (10th Cir.), *cert. denied*, 389 U.S. 992 (1967)).

Like the defendant in *Connell*, Mr. Moussaoui's *Miranda* warnings, undermined as they were by the agent's qualification that Mr. Moussaoui did not have the right to counsel in immigration matters, were "equivocal and open to misinterpretation." *Connell*, 869 F.2d at 1353. Indeed, in Mr. Moussaoui's case this misinterpretation likely was magnified given that he was a non-U.S. citizen whose native language was not English, he had never before been arrested in the United States or had *Miranda* rights read to him, and he was unfamiliar with U.S. criminal laws and his rights under them. Further, if Mr. Moussaoui's misunderstanding was a result of active misrepresentation by the INS agents, then his statements may be deemed involuntary under the Fifth Amendment. *See, e.g., United States v. Anderson*, 929 F.2d 96, 100 (2d Cir. 1991) (finding involuntary a post-*Miranda* confession that was the result of a law enforcement officer's

affirmative misrepresentation, and noting that "the Supreme Court has found that affirmative misrepresentations by the police may be sufficiently coercive to invalidate a suspect's waiver of the Fifth Amendment privilege").

Conclusion

Accordingly, for the foregoing reasons, and any others adduced at a hearing on this motion, Zacarias Moussaoui moves this Court to suppress all of his statements made to federal law enforcement officers following his arrest.

Respectfully submitted,

ZACARIAS MOUSSAOUI
By Counsel

/S/
Frank W. Dunham, Jr.
Federal Public Defender
Eastern District of Virginia
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0808

/S/
Edward B. MacMahon, Jr.
107 East Washington Street
P.O. Box 903
Middleburg, VA 20117
(540) 687-3902

/S/
Gerald T. Zerkin
Senior Assistant Federal Public Defender
Eastern District of Virginia
830 E. Main Street, Suite 1100
Richmond, VA 23219
(804) 565-0880

/S/
Judy Clarke
Federal Defenders of
Eastern Washington and Idaho
10 N. Post, Suite 700
Spokane, WA 99201
(703) 600-0855

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Suppress Statements and Memorandum in Support thereof was served by hand upon AUSA Robert A. Spencer, AUSA David Novak, and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314 this 13th day of June, 2002.

/S/
Frank W. Dunham, Jr.